SUPREME COURT OF THE UNITED STATES.

No. ~~179~~ 94.301

BENJAMIN F. IRVINE, PLAINTIFF IN ERROR,

vs.

JOHN R. IRVINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 173.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United of America, holden in and for the district of Minnesota, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you or some of you, between Benjamin F. Irvine, plaintiff, and John R. Irvine, defendant, in a plea which is in the said circuit court, a manifest error hath happened, to the great damage of the said Benjamin F. Irvine, plaintiff, as he says, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein giving, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Min-
2 nesota, this seventeenth day of August, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth year.

H. E. MANN,
Clerk of the Circuit Court of the United States for the District of Minnesota.

LORENZO ALLIS, *Plaintiff's Attorney.*

3 The answer of the judges of the circuit court of the United States for the district of Minnesota, in the ninth circuit, in within writ, mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this fifteenth day of September, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

H. E. MANN, *Clerk.*

4 Filed Aug. 17, 1864.

H. E. MANN, *Clerk.*

5 UNITED STATES OF AMERICA, *ss:*

To John R. Irvine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein Benjamin F. Irvine is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota, this 17th day of August, in the year of our Lord one thousand eight hundred and sixty-four.

R. R. NELSON,
One of the Judges of the Circuit Court of the United States for the District of Minnesota.

6 STATE OF MINNESOTA, *County of Ramsey, ss:*

W. D. Storey came personally before me, and being duly sworn, says that on the 19th day of August, A. D. 1864, at St. Paul, in said county of Ramsey, he served the within citation on Messrs. Smith & Gilman, the attorneys of the defendant within named in the within cause, by then and there giving to and leaving in the hand of John M. Gilman, who is well known to this affiant to be one of the above-named attorneys, a true copy of said citation.

W. D. STOREY.

Subscribed and sworn to before me this 27 day of Aug., 1864.

H. E. MANN, *Clerk of said Circuit Court.*

Due service by copy of the within citation is hereby admitted, at St. Paul, Min., this 19th day of August, A. D. 1864.

SMITH & GILMAN, *Def't's Att'ys.*

Filed August 27, 1864.

H. E. MANN, *Clerk.*

7 *Schedule.*

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

Pleas before the honorable the judges of the circuit court of the United States of America in and for the district of Minnesota, at Saint Paul, in said district, of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered, that on this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four, came the marshal of the United States for the district of Minnesota, and filed in the clerk's office of said court the declaration of the plaintiff above named in this cause, which is in the words and figures following, viz:

Circuit court of the United States for the district of Minnesota, of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four.

DISTRICT OF MINNESOTA, *ss:*

Benjamin F. Irvine, a plaintiff in this suit, who is a citizen of the State
8 of Ohio, by Lorenzo Allis, his attorney, complains of John R. Irvine, defendant in this suit, who is a citizen of the State of Minnesota:

In that whereas the said Benjamin F. Irvine, on the 15th day of October, in the year of our Lord one thousand eight hundred and forty-nine, was possessed of all those tracts or parcels of land, with the appurtenances, situate in the county of Ramsey, in the district aforesaid, and described as follows, to wit: lots nine (9) and eleven, (11,) in block thirty-seven, (37;) lot eight, (8,) in block forty-one, (41;) lot three, in block forty-six, (46,) and lot eleven, in block forty-nine, (49,) all in Rice and Irvine's addition to St. Paul, accord-

ing to a certain plat thereof on record in the office of the register of deeds of the county of Ramsey aforesaid, four undivided fifths of which said premises the said Benjamin F. Irvine claims in fee, whereof the value is more than five thousand dollars, and he, the said Benjamin F. Irvine, being so possessed thereof, the said John R. Irvine afterwards, to wit, on the 31st day of December, in the year of our Lord one thousand eight hundred and forty-nine, entered into the said premises and ejected the said Benjamin F. Irvine therefrom, and unjustly withholds from the said Benjamin F. Irvine the possession thereof, to the damage of the said Benjamin F. Irvine five thousand dollars. And therefore he brings his suit, &c.

LORENZO ALLIS, *Attorney for Plaintiff.*

To which declaration was attached the following notice or memo-
9 randum in writing, viz:

To John R. Irvine, the defendant aforesaid:

You are hereby notified that the declaration with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed on the thirtieth day of April instant, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of such rule, and that if you neglect to so appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated the 29th day of April, A. D. 1864.

Yours, &c.,

LORENZO ALLIS, *Plaintiff's Attorney.*

Which said declaration and notice were endorsed by the marshal of the United States for the district of Minnesota, in the words and figures following, viz:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that on the 29th day of April, 1864, at the city of St. Paul, in the State of Minnesota, I personally served J. R. Irvine, the defendant in this suit, who is the actual occupant of the premises for which this action is brought, with a true copy of the declaration hereto annexed, and also a true copy of the notice in writing to the said declaration sub-
10 joined and likewise hereunto annexed.

Service and travel $2 12.

CHAS. EATON, *U. S. Marshal.*

And afterwards, to wit, on the 30th day of April, in the year of our Lord one thousand eight hundred and sixty-four, came the said plaintiff, by Lorenzo Allis, his attorney, and entered in the rule and order book of said court, the rule to plead, in the words and figures following, viz:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Of the 30th day of April, A. D. 1864.

In this cause, the declaration and notice having been returned personally served, and the defendant having entered no appearance, on motion of Lorenzo Allis, plaintiff's attorney, ordered that the defendant herein plead to the plaintiff's declaration on file within twenty days after the entry of this rule, or be defaulted.

And afterwards, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and sixty-four, came the defendant, by Smith & Gilman, and entered his appearance in said cause, and filed in the clerk's office of said court his plea to the plaintiff's declaration in the words and figures following, viz:

United States circuit court for the district of Minnesota.

11 BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Plea.

Of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four.

And the said John R. Irvine, by his attorneys, Smith & Gilman, comes and says he is not guilty of unlawfully withholding the premises claimed by the said Benjamin F. Irvine, as alleged in said declaration of the said Benjamin F. Irvine. And of this he puts himself upon the country. And the said plaintiff doth the like.

SMITH & GILMAN, *Att'ys for said Def't.*

And afterwards, to wit, at a stated term of said court, to wit, the June term thereof, in the year of our Lord one thousand eight hundred and sixty-four, on the seventh day of said term, the following proceeding, among others, was had, viz:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

And now comes the plaintiff in this cause, by Lorenzo Allis, his attorney, and the defendant appears by John M. Gilman, his attorney, and it appearing that this cause is properly on the calendar, on motion of plaintiff, by his attorney, ordered that this cause do stand for immediate trial.

12 And, thereupon, the following jurors were duly empannelled and sworn to try the issue joined herein, viz: Abner Allen, J. C. Stevens, Joseph Carlir, W. Carpenter, Samuel Moss, A. Armstrong, J. W. Tyson, Thos. McMannus, J. M. Williams, Geo. F. Potter, H. J. Taylor, Geo. Watson.

Case opened for plaintiff by L. Allis, his attorney, and documentary evidence introduced.

And here the plaintiff rests his case.

Case opened for defendant and documentary evidence introduced on his part.

And here the defendant rests his case.

Benjamin F. Irvine and Mis Findley McCormick sworn and examined as witnesses on the part of the plaintiff.

John R. Irvine sworn and examined as a witness on the part of the defendant.

And afterwards, to wit, on the eighth day of said term of said court the following proceeding, among others, was had, viz:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

Jury called and all answer to their names. Examination of John R. Irvine resumed. Nancy Irvine sworn and examined as a witness on the part of the defendant. Mrs. Trumbull sworn and examined as a witness on the part of the defendant. Hiram Stillwell and J. K. Humphrey sworn and examined as witnesses on the part of the defendant.

13 And here the defendant rests.

J. M. Gilman, esq., sums up for defendant. Lorenzo Allis, esq., sums up for plaintiff.

And afterward, to wit, on the ninth day of said term of said court the following proceeding, among others, was had:

BENJAMIN J. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

And now the jurors empannelled to try the issue joined in this cause are called and all answer to their names.

And thereupon charge is given by the court to the jury, who then retire in charge of an officer duly sworn and qualified to attend them, and who, being returned into court, say that the said John R. Irvine is not guilty of the trespass or ejectment laid to his charge in manner and form as the said Benjamin F. Irvine hath complained against him.

Therefore it is considered that the said defendant go without day and recover of the plaintiff his costs herein to be taxed, and that he have execution therefor.

And afterwards, to wit, at said term of said court the said plaintiff, by his said attorney, presented his bill of exceptions, which was duly signed and sealed by the judge presiding in said court and filed therein, and is in the words and figures following:

14 Circuit court of the United States for the district of Minnesota.

BENJAMIN F. IRVINE, plaintiff,
vs.
JOHN R. IRVINE, defendant. } Ejectment.

Be it known, that afterwards, to wit, at the June term, A. D. 1864, of said court, held at the city of St. Paul, in said district, and on the day of June, A. D. 1864, before the Honorable R. R. Nelson, associate justice of the said court, the aforesaid issue came on to be tried by a jury of said district for that purpose duly empannelled, good and lawful men of said district.

At which day came then the said plaintiff and the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empannelled to try said issue being called also came and were then and there in due form chosen and sworn to try said issue.

And upon the trial of the said issue the counsel for the said pl'ff, to maintain and prove the said issue on his part, produced and offered in evidence certain letters patent of land from the United States to the said pl'ff in words and figures following, to wit:

Pre-emption certificate No. 141.

The United States of America to all to whom these presents shall come, greeting:

Whereas Benjamin F. Irvine, of St. Croix County, of Wisconsin, has deposited in the General Land Office of the United States a certificate
15 of the register of the land office at the Falls of St. Croix, whereby it appears that full payment has been made by the said Benjamin F. Irvine according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for lot No. four of section six, in township twenty-eight north, of range twenty-two west, in the district of lands subject to sale at the Falls of St. Croix, Wisconsin, containing fifty-one acres and sixty-four hundredths of an acre, according the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been pur-

chased by the said Benjamin F. Irvine: Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Benjamin F. Irvine, and to his heirs, the said tract above described, to have and to hold the same, together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Benjamin F. Irvine and to his heirs and assigns forever.

In testimony whereof, I, Zachary Taylor, President of the United States of America, have caused these letters to be made patent and the seal [SEAL.] of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the eighth day of October, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-fourth.

By the President:

16 Z. TAYLOR,
By THOS. EWING, JR., *Secretary.*

THOS. S. WILSON,
Acting Recorder of the General Land Office ad interim

Recorded vol. 1, page 130.

And the counsel for the pl'ff, further to maintain and prove said issue, offered to prove that the lands described in the declaration were parcels of the lands described in and granted by said letters patent, and also that said defendant was then and at the commencement of this action in possession of the lands described in said declaration; and the counsel for def't thereupon offered to admit, and in behalf of said defendant it was then and there duly admitted, by the said counsel, in behalf of said def'ts, that the lands described in said declaration were parcels of the land described in and granted by said letters patent and that the said def't was then and at the commencement of this action in possession thereof.

And the counsel for the pl'ff here rested his cause.

And the counsel for the def't, to maintain and prove said issue on his part, produced and offered in evidence a certain deed, purporting to be a deed of conveyance of the lands therein described from said plaintiff to said defendant, in words and figures following, to wit:

This indenture, made this 8th day of May, 1849, between Benjamin F. Irvin, of the county of St. Croix and Territory of Minnesota, of the
17 first part, and John R. Irvine of the same place, witnesseth, that the said party of the first part, for and in consideration of the sum of five hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, conveyed, and confirmed, and by these presents does give, grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever all the following described piece or parcel of land, with the exception and reservation hereinafter mentioned, situate, lying, and being in the county of said St. Croix and known and designated as follows: as lot number four, (4,) in section number six, (6,) in township No. twenty-eight (28) north, of range number twenty-two (22) west, containing fifty-one acres and sixty-four hundredths; said lot or tract of land has been surveyed and laid out in town lots by B. W. Brunson, and is a part of Rice and Irvine's addition to Saint Paul; and the said Benjamin F. Irvine reserves to himself lots number eight (8) and seven, (7,) in block number thirty-five, (35,) and lot number twelve, (12,) in block thirty-seven, (37,) fronting on Washington street; lot number nine, (9,) in block number forty-six, (46,) and lot number twelve, (12,) in block number forty-seven, (47,) fronting on Washington

street; lot number six, in block number thirty-one, (31,) fronting on Exchange street; each of said lots thirty feet in length and one hundred and fifty deep; and lot No. ten, (10,) in block number thirty-one, (31,) fronting public square, fifty feet long and one hundred and twenty (120) feet
18 deep. To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, in and to the above-described premises, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said party of the second part, his heirs and assigns, that he is well seized in fee of the aforesaid premises and has good right to sell and convey the same in manner and form as above written, and that the same are free from all incumbrances whatsoever; and that the aforesaid premises in the quiet and peacable possession of the said party of the second part, his heirs and assigns, against all and every person lawfully claiming or to claim the whole or any part thereof he will forever warrant and defend.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJAMIN F. IRVINE. [SEAL.]

Sealed and delivered in the presence of—

WM. D. PHILLIPS.

C. COOK.

TERRITORY OF MINNESOTA, *County of St. Croix, ss:*

19 Be it known that on the 8th day of May, A. D. 1849, before the undersigned personally came Benjamin F. Irvine, the grantor of the foregoing and within deed from him as such grantor to John R. Irvine, to me personally known to be the identical person described in and who executed said deed, and he has acknowledged that he executed said deed freely and voluntarily for the uses and purposes therein expressed.

BENJA. W. BRUNSON, *Justice of the Peace.*

REGISTER OF DEEDS OFFICE, *County of St Croix.*

I hereby certify that the above deed and acknowledgment was this day produced in this office, and was thereupon duly recorded in Book B, pages 176 and 177.

Done at Stillwater, May 22nd, A. D. 1849.

W. HOLCOMBE, *Register of Deeds.*

Filed Nov. 16, A. D. 1855, at 4¾ p. m.

And the counsel for the plaintiff then and there objected to the introduction of said deed in evidence, on the ground that the same having been executed before said letters patent were given, did not convey from said plaintiff to said def't the estate which said pl'ff acquired under and by virtue of said letters patent, and that said evidence was incompetent and irrel-
20 levant to said issue. But the said judge of said court did then and there overrule said objection, and decide that the said deed should be read in evidence on the part of the said def't; to which said opinion and decision of the said judge the said counsel for the said pl'ff did then and there, on behalf of the said pl'ff, except.

And the counsel for the def't, further to maintain and prove the issue on his part, proceeded to offer in evidence a certificate of the register of the land office in words and figures following, to wit:

U. S. Land Office, *Taylor's Falls, Minnesota, June 14th,* 1864.

I hereby certify that on examination of the tract books, plats, and other official records of this office, I find that on the 21st day of February, 1849, one Benjamin F. Irvine entered lot (4) four, in section No. six, (6,) in township No. twenty-eight, (28,) of range No. twenty-two, (22;) that the patent for said land was issued under date of October 8th, 1849, by the President of the United States to the said Benjamin F. Irvine; and it further appears by the records of this office that no other person or persons ever acquired any title from the United States to said land.

In witness whereof, I have hereunto set my hand, at the land office, Taylor's Falls, Minnesota, the day and year first above written.

G. M. STICKNEY, *Register.*

And the counsel for the pl'ff then and there objected to the intro-
21 duction of said certificate in evidence, on the ground that the same was incompetent and irrellevant. But the said judge of said court did then and there overrule said objection, and decide that the said certificate under the laws of the State of Minnesota should be read in evidence on the part of said defendant; to which said opinion and decision of said judge the said counsel for said plaintiff did then and there, on behalf of said pl'ff, except.

And the counsel for the def't here rested his case.

And the counsel for the pl'ff, further to maintain and prove the said issue on his part, called Benjamin F. Irvine as a witness, who, being duly sworn, testified:

I am pl'ff in this action; know the def't; he is my elder brother; about 16 years older than I am; know the property in controversy. (Said witness was then shown the deed put in evidence by the counsel for the def't purporting to have been executed by said pl'ff to said def't on the 8th day of May, A. D. 1849, and having examined the same, further testified.) I recognize this deed as one executed by me at the time it purports to have been executed, the 8th day of May, 1849. When I executed this deed I was not twenty-one years old. I was born on the 23d day of May, A. D. 1828. I came of age on the 23d day of May, A. D. 1849. I executed this deed on the day it was dated. A few days before I executed this deed my brother, the def't, came to me and wanted me to make him a deed of this piece of land. I told him that that was something I did not expect of him. He
22 told me that he had agreed to sell certain lots to other parties, and that he wanted a deed from me. I told him I did not expect this from him, though I would consider the matter. I told him I would convey the lots he had bargained. He pressed me to convey to him the whole. I refused at that time to give him the deed. Afterwards he came to me again and asked me if I had made up my mind to deed him the land. I told him I had, with certain reservations. I selected certain lots and went to Mr. Phillips and had him draw a deed of this land, reserving to myself twelve lots. He drew the deed. I acknowledged it. I handed it to the def't. He was very indignant and would not accept it. He said he had conveyed some of the lots I had reserved. He then threatened me that if I would not convey him the property he would take measures that would deprive me of it anyhow. He used such language to me that I was finally induced to say to him that he might make a deed as he chose and I would sign it. After he saw what my feelings were he selected out seven lots, which he said I might reserve. I then went and had a deed made of this property, reserving the lots he had selected, and executed it. This deed in evidence and now shown me, from myself to def't, dated the 8th May, A. D. 1849, is the one I then executed.

And the counsel for said def't, further to maintain and prove said issue on his part, then cross-examined said witness, and on such cross-examination he testified:

I entered this land in February, A. D. 1849. The register of the
23 land office was here in St. Paul, and I paid him the money for the land. I took his personal receipt and agreement to send me the duplicate.

He afterwards sent me the duplicate for the land. The defendant furnished me with the money to pay for the land. I did not enter the land for him. He did not furnish me with the silver to enter the land for him. I did not tell the land officers that I wanted to enter the land for him. The def't did not pay me anything for the land when I deeded to him. I never joined in the survey and plotting of this land into town lots. When I took the money to enter this land it was not understood between myself and def't that I should enter it for him. I moved to Ohio in 1861, where I now reside. I resided in St. Paul from the time I made this deed till 1861, with the exception of fifteen months.

And the counsel for the pl'ff, further to maintain and prove said issue on his part, then re-examined said witness, and on such re-examination he testifies:

The def't came to me and told me that there was quite a strife to get land, and advised me to enter this land. At the time I paid for it he told me that the register was present in Saint Paul and that I had better take the money and give it to the register, and save myself a trip to St. Croix Falls, where the land office was then kept. There was no understanding that I was entering the land for the def't or that I should afterwards deed it to him. I entered the land as pre-empted. This is the personal receipt which I took when I paid the money for the land.

24 And the counsel for the pl'ff, further to maintain and prove said issue on his part, then introduced and read in evidence the aforesaid personal receipt, identified and referred to by the aforesaid witness, which was in words and figures following, to wit:

"This is to certify that I, G. W. Brownell, clerk for the register of the Falls of St. Croix land office, have this the 21st day of February, A. D. 1849, received of Benjamin F. Irvine, of St. Croix County, Territory of Wisconsin, the sum of sixty-three 55-100 dollars, ($63 55,) being in full payment for the purchase of lot number four in section No. six, in township No. 28 north, of range No. 22 west of 4th principal meridian, containing fifty-one and sixty-four hundredths acres.

"This receipt it is understood shall be replaced by a duplicate receipt under the proper signature, as prescribed by law.

"G. W. BROWNELL, *Clerk for Register.*

"St. Paul, Wisconsin Territory."

And the counsel for the pl'ff, further to maintain and prove said issue on his part, called Mrs. McCormick as a witness, who, being duly sworn, testified:

I am acquainted with the parties to this action, and a sister of the parties. I am older than the pl'ff but younger than the def't. I know the pl'ff's age and the time of his birth. He was born the twenty-third day of May, A. D. 1828. There was a record of the births in our family kept in the family Bible. I have seen that record, it was formerly in the possession of my father and mother in Danville, State of New York. I took a copy of
25 that record while in their possession, which I still have. My father and mother are dead. I afterwards saw that Bible and the record in it at the house of the def't, in St. Paul. This was in 1856 I think. The birth of the pl'ff was in this record.

And the counsel for the pl'ff, further to maintain and prove said issue on his part, offered to call Mrs. Bradley as a witness, who would testify that she was an elder sister of the pl'ff, and knew his age and the time of his birth, and knew that he was born on the 23d day of May, A. D. 1828. And thereupon the counsel for the def't stated to the court that he should not offer any evidence on the part of the def't as to the age of the pl'ff, and that there would be no controversy raised by the def't on that question. And thereupon the counsel for the plaintiff here rested his cause.

And the counsel for the def't, further to maintain and prove said issue on his part, then called John R. Irvine, the def't, as a witness, and offered to prove by said witness that he, said def't, came to St. Paul in 1843, and that pl'ff came there in 1848, and boarded with def't and lodged with him a portion of the time, and that def't furnished the pl'ff the money to enter the land, and that pl'ff was to enter it in def't's name, and that pl'ff took the money and went to the land office in Stillwater to enter the land, and was gone four days, and when he came back he informed witness that he had entered the land in his own name, and would deed it to witness, he having been advised
at the land office to enter it in his own name, and that this took
26 place in February, 1849, and that since the deed from pl'ff to witness was executed, and before the commencement of this action, large and valuable improvements to the amount of $40,000 have been erected on portions of the land described in said deed, but no part of them on the premises described in the declaration in this case. But to the admission of said matters so offered to be given in evidence on the part of the said def't, as aforesaid, the counsel for the said pl'ff did then and there object, because that the same was incompetent and irrellevant. But the said judge did then and there overrule said objection and decide that the matters so offered as aforesaid should be given in evidence on the part of the said defendant; to which said opinion and decision of the said judge the said counsel for the said pl'ff did then and there, on behalf of said pl'ff, except.

And the said counsel for said def't, further to maintain and prove said issue on his part, produced and offered in evidence a certain written agreement of lease between the said def't of one part and the said pl'ff, def't, and others of the other part, in words and figures following, to wit:

Articles of agreement, made and entered into this eighth day of May, one thousand eight hundred and fifty-four, between John R. Irvine, of the first part, and John R. Irvine, George Irvine, George W. Turnbull, and Benj. F. Irvine, acting and doing busines under the name and firm of J. R. Irvine
& Co., of the second part, all of the city of St. Croix, county of Ramsey,
27 and Territory of Minnesota, as follows, viz: The said J. R. Irvine, party of the first part, for and in consideration of the sum hereinafter mentioned, doth agree to lease and rent for the term of one year, from the first of day of May, A. D. 1854, to the first day of May, 1855, his new frame warehouse, situated at the upper landing in the city of St. Paul, to the aforesaid J. R. Irvine, George Irvine, George W. Turnbull, and Benj. F. Irvine, for the term aforesaid, they to have the exclusive right to occupy said building, storeroom, offices, and the levee in front of said building, and all other rights and privileges which may be requisite or necessary to the successful prosecution of the business of the wholesale and retail of groceries and provisions, also in the storage, forwarding, and commission business.

In consideration of which the said parties of the second part hereby promise and agree to pay to the said party of the first part the yearly rent of one thousand dollars, payable as follows, viz: two hundred and fifty dollars on the first day of August, A. D. 1854, two hundred and fifty dollars on the first day of November, A. D. 1854, two hundred and fifty dollars on the first day of February, A. D. 1855, and two hundred and fifty dollars on the first

day of May, A. D. 1855; and for the true and faithful payment of the aforesaid sum of one thousand dollars as above stated, we, the parties of the second part, hereby bind ourselves, collectively and individually, our heirs and executors, administrators and assigns. And at the expiration of the said term of one year to yield up quiet, and peacable possession of said premises to the said party of the first part, in as good order and repair as the same now are, reasonable wear, tear, and accidents by fire only excepted. The
28 said John R. Irvine, party of the first part, hereby reserving so much of the office aforesaid as may be required for a desk, books, papers, and for the transaction of his private business without any interruption or molestation by the said parties of the second part, or either of them.

In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written.

JOHN R. IRVINE. [SEAL.]
GEO. IRVINE. [SEAL.]
GEO. W. TURNBULL. [SEAL.]
B. F. IRVINE. [SEAL.]
JOHN R. IRVINE. [SEAL.]

Signed, sealed, and delivered in presence of—
J. C. BURBANK.
J. MCCORMICK.

And the said John R. Irvine above mentioned hereby agrees to give the above-named firm the privilege of extending the lease above-named as may be agreed upon by them, the rest to be proportioned according as the business may justify, either by increasing or decreasing the same.

St. Paul, May 20th, 1854.

JOHN R. IRVINE.

And it was then and there conceded by the parties that the premises described in said lease were no part of the premises described in said pl'ff's declaration, but that the warehouse mentioned therein was situated on a portion of the premises described in said patent, and in the deed from plaintiff to said defendant. And to the reading of said written agreement of lease in evidence the said counsel for the said pl'ff did then and there ob-
29 ject because that the same was incompetent and irrellevant.

But the said judge did then and there overrule said objections and decide that the said written agreement of lease should be read in evidence on the part of said def't, to which said opinion and decision of said judge the said counsel of said pl'ff did then and there, on behalf of said pl'ff, except.

And the said counsel for the said def't, further to maintain and prove said issue on his part, called as a witness Mr. Humphry, and offered to prove by said witness that he, the said witness, some time in 1853 or 4, took to the pl'ff the draft of a quitclaim deed from said pl'ff to one Tullis of two lots, being parcels of the land described in said patent and in the deed from plaintiff to said defendant, but no part of the premises described in said pl'ff's declaration, and asked said pl'ff to execute the same, and that said pl'ff refused to execute the same, saying he claimed no interest in these lots, and it was unnecessary for him to execute the quitclaim.

But to the admission of said matters so offered to be given in evidence on the part of the said def't, as aforesaid, the said counsel for the said pl'ff did then and there object, because that the same were incompetent and irrellevant.

But the said judge did then and there overrule said objection, and decide that the matters so offered should be given in evidence on the part of said def't; to which said opinion and decision of said judge the said counsel for the said pl'ff did then and there, on behalf of said pl'ff, except.

30 And the counsel for the def't here rested his cause.

And the counsel for the said pl'ff, further to maintain and prove said issue on his part, gave in evidence by competent witnesses that some time in 1853 or '54 def't applied to pl'ff to get pl'ff to execute to def't a deed of the premises described in the said deed, dated the 8th May, 1849, and that said pl'ff then refused to execute said deed, saying that if he had any rights to said property he intended to hold on to them; and also that said pl'ff in 1858 gave notice, by advertisement published in the newspapers at St. Paul, that he claimed to be the owner of the premises described in the said patent, and that said deed dated 8th of May, 1849, from said pl'ff to said def't was void.

And the said pl'ff's counsel here rested his case. And thereupon the counsel for the pl'ff requested the court to give to the jury the following instructions as hereinafter numbered, to wit:

1st. That the deed in evidence from pl'ff to def't dated 8th May, 1849, did not pass the estate acquired subsequently under the patent in evidence from the government to the pl'ff, even assuming the majority of the pl'ff at the time of its execution. But the court declined so to instruct the jury.

2nd. If the jury find that the said deed was executed by the pl'ff while under age, (and the evidence is uncontroverted on this point,) the said deed is void. But the court declined so to instruct the jury.

4th. A deed of land executed by an infant may be avoided by the infant after he becomes of age, at any time within the period of the statute of
31 limitations, which in this state is twenty years; that is, he may in such case in this State avoid his deed at any time within twenty years after he becomes of age. And the court instructed the jury that such was the law, unless the infant had previously ratified the deed.

5th. Such avoidance may be by another deed of same land to another grantee after the infant becomes of age, or it may be by suit or by other similar unequivocal act. And the court so instructed the jury.

6th. In case of sale or deed of real estate by an infant there must be some act of affirmance by him after he becomes of age as solemn in character as the original act itself; otherwise, the deed may be avoided by him at any time before the statute of limitations bars him. Mere acquiesence however long, if short of the statute of limitations is not sufficient. The act of confirmation must be of such solemn and undoubted nature as to establish a clear intention to confirm the deed after a full knowledge that it was avoidable. And the court declined to instruct the jury that the act of affirmance must be as solemn in character as the original deed itself, but stated that mere acquiescence is not of itself sufficient evidence of affirmance, and that the ratification or affirmance must be of a clear and unequivocal character, showing the intention of the infant to confirm his deed.

7th. There is no evidence whatever of any affirmance or confirmation of the deed in this case by the pl'ff after he became of age of the nature and character required. The evidence in this case shows no affirmance
32 of this deed by the pl'ff after he became of age. But the court declined so to instruct the jury.

8th. No agency or trust binding on the pl'ff has been shown to have been created or to have existed between the pl'ff and the def't during the infancy of the former. No contract is binding on the infant made during his infancy except for necessaries. And the court instructed the jury that the latter portion of this request was true, and that although an agency or trust could not be created binding upon the infant, still if there was subsequent ratification by the infant of acts done during his infancy, he would be bound by them.

9th. Even had the pl'ff been of full age when the def't gave him the money to enter the land, as def't testifies, and directed him, as def't testifies, to enter

the land for def't, and the said pl'ff had entered the land in his own name, still the def't could not have compelled in law or equity the pl'ff to deed or convey the property to said def't. And the court declined to so insruct the jury, upon the ground that it was admitted by the def't that said pl'ff was not of full age when the money to enter the land was given him, and consequently this request had no application to the case in hand.

10th. No trust has been shown in this case between the parties to this suit, by which the def't could have enforced a conveyance of the land from said pl'ff to him. And the court declined to instruct the jury as above requested, but said that there had been evidence on the part of def't
33 going to show that the pl'ff was employed to enter the land in question, and although an infant, as he afterwards affirmed his acts, would be bound by it.

11th. Even if the pl'ff had entered the land as agent of def't, and had entered it in his own name contrary to instructions of his principal, yet if the def't afterwards approved of such entry, such approval was a ratification of said entry. And the court instructed the jury that this might be true, but the evidence showed that the infant had conveyed the land after entry by him, and it was for the jury to say whether he had ratified his deed.

12th. No acts of affirmance by the pl'ff have any bearing in this case except they relate to the property described in the declaration, and all evidence on this point, except as to the lots described in the declaration, must be excluded and disregarded by the jury. And the court declined so to instruct the jury.

To all and singular which refusals and instructions aforesaid the said counsel for plaintiff did then and there on behalf of said plaintiff respectively except.

And the said judge of said court did then and there further instruct said jury as to the 4, 5, and 6 of said instructions so prayed by said pl'ff's counsel, as aforesaid:

That the question here is not whether there has been an avoidance. The defence is that the deed has been ratified by pl'ff. I am of the opinion that said ratification should be if not equally solemn, of a clear and unequivocal character, showing the intention of the party to confirm his deed. An avoidance may be by a deed to a third party, or, as held in this country, in
34 other ways.

But the deed by pl'ff to def't was not void; it was simply voidable and passed the title absolutely, until by some adequate act he affirmed it. The question is, has it been disaffirmed or ratified by pl'ff since he come of age? All the facts in proof, such as leasing part of the property remaining in the vicinity a long time without asserting his claim while valuable improvements were being put on the property, are to be considered by the jury in deciding whether there has been a ratification by pl'ff, but mere acquiescence does not amount to a ratification. The authorities are somewhat conflicting as to what is necessary to constitute an avoidance. Lord Lyndhurst was of opinion that a deed was necessary to avoid a deed given while under age. I think that this doctrine is perhaps sound and ought to have been held in this country; but it has been held in this country that an infant may avoid his deed by going upon the land or by bringing suit, &c.

And with the foregoing qualification the 6th instruction asked by the pl'ff's counsel is correct, with the exception that the counsel has reversed the application of the law in his proposition. The act of avoidance and not the act of ratification is what the law requires to be equally solemn with the conveyance.

To which said instructions of the said judge in so far as they differed from or changed or qualified the said instructions so prayed by said pl'ff's counsel as aforesaid, the said counsel for said pl'ff did then and there on behalf of said pl'ff except.

35 And the said judge of said court did then and there further instruct said jury :

That there had been evidence on the part of def't going to show that the pl'ff was employed as an agent to enter the land in question, and although an infant, if he afterwards affirmed his agency, he would be bound by the terms of such agency. To which said instruction the said pl'ff's counsel did then and there, on behalf of said pl'ff, except.

And thereupon the said judge left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, who then and there gave their verdict for the said defendant.

And because the aforesaid several matters did not appear by the record of the said trial and verdict, the said pl'ff's counsel did then and there propose his aforesaid exceptions to the opinion of said judge, and request him to put his seal to this bill of exceptions.

Whereupon the said judge hath to this bill of exceptions put his seal this sixth day of July, A. D. 1864.

[SEAL.] R. R. NELSON, *U. S. Judge.*

Judgment record signed this eleventh day of July, A. D. 1864.

H. E. MANN, *Clerk.*

36 UNITED STATES OF AMERICA,

Circuit Court of the United States for the District of Minnesota, ss :

I, H. E. Mann, clerk of said court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the bill of exceptions therein, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation of appeal, together with the proof of the service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this fifteenth day of September, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth year.

H. E. MANN, *Clerk.*

Fees.

80 folios copy	$8 00
3 fol. certificate and ret	45
2 seals	40
	8 85

Filed November 10, 1864.